

# Federal Compliance and Tax Considerations under the CARES Act for Tribes

**REDW**<sub>LLC</sub> expertise.

May, 2020

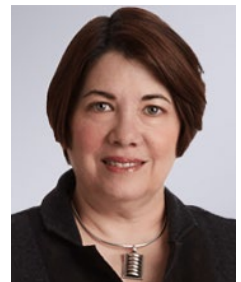
*Presented by:*

Corrine Wilson, CPA - Principal, REDW LLC

Mary Streitz, Attorney – Partner, Dorsey & Whitney LLP

## Agenda

- Overview of Federal Compliance with Treasury's Tribal COVID-19 CARES Act
  - Corrine Wilson, CPA, Principal and National Tribal Practice Leader
- Tax Considerations under CARES Act
  - Mary Streit, Attorney, Partner, Co-Chair Indian and Alaska Native Practice Group



## **Stimulus 1 - Minimum \$40M for:**

- FEMA, CDC and IHS funding Tribes, Tribal organizations, urban Indian health organizations, or health service providers to Tribes
- to carry out surveillance, epidemiology, laboratory capacity, infection control, mitigation, communications, and other preparedness and response activities

## Stimulus 2 – Families First

- Free coronavirus testing, paid leave, payroll tax credits; enhanced unemployment insurance, expanded food security initiatives, and increased federal Medicaid funding
- \$64M to IHS for COVID-19 diagnostic testing
- Nutrition services for older Indians

## Stimulus 3 – Title V – State, Local, Tribal Governments

- \$8 billion reserved for distribution to Tribal governments
- Tribes filed Certificates, distributed 60% (\$4.8B); another 40% yet to be released
- Tribes to file electronic forms with Treasury by 5/26/20 (See Handout)
  - Data on number of tribal employees (total Tribe), quarterly 941's for 2019
  - Government expenditures from prior year audit, less capital outlays and debt service
  - Federal financial assistance amount of the government expenditures reported
- Litigation over distributions to Alaska Native Corporations and for Treasury to immediately distribute all relief funds

## **BIA and IHS additional \$1 billion for the IHS and \$453 million for the BIA**

- BIA: \$400 million of the BIA appropriation must be made available to meet the direct needs of Tribes
  - Public safety and justice programs, deep cleaning of facilities, personal protective equipment, information technology to improve teleworking capability, welfare assistance and social services programs (including assistance to individuals)
- IHS: \$450 million distributed to IHS direct-service health programs
  - Public health support including funding for PRC programs and Catastrophic Health Emergency Fund (“CHEF”) reimbursements

## IG Oversight

- IG for Department of the Treasury has authority for monitoring and oversight of the receipt, disbursement, and use of Coronavirus Relief Funds.
- Funds used for in-eligible purposes will be booked as a debt owed to the Federal Government.
  - Amounts recovered will be deposited into the general fund of the Treasury.
- The CARES Act provides \$35 million to the IG for oversight and recoupment activities

## Tribal Relief Fund

“...expenditures must be used for actions taken to respond to the public health emergency” including “second-order effects of the emergency, such as by providing economic support to those suffering from employment or business interruptions due to COVID-19-related business closures.”

- Compliance-expenditures
  - Costs are necessary due to COVID-19 public health response
  - Costs were not budgeted by 3/27/20 of the government
  - Costs were incurred from 3/1/20 to 12/30/20
  - May NOT be used for revenue replacement/shortfalls
  - Return unused funds
  - May earn interest, interest to be restricted to meet funds use



## **Tribal Relief Fund** *(See Handout from Treasury)*

- A cost is eligible if:
  - It cannot lawfully be funded using a line item, allotment, or allocation within that budget; or,
  - It is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation.
- A cost is not considered to have been accounted for in a budget merely because it could be met using a budgetary stabilization fund, rainy day fund, or similar reserve account.
- No guidance for IDC or Single Audit yet
  - Treasury will likely publish for final distributions

## Treasury FAQ's Guidance

- Payroll & related for public safety, public health, health care, human services and similar employees, or re-deploying other employees to respond, as long as government deems they are dedicated to mitigating/responding to COVID-19
- Economic support
  - Grants to small businesses for costs of business interruption by required closures

## Treasury FAQ's Guidance (*continued*)

- Teleworking costs for those necessary as administratively determined, reimbursement basis
- Employment and training programs for employees that were furloughed
- Health insurance for those laid-off/furloughed
- Unemployment costs

## Treasury FAQ's Guidance (continued)

- Other health costs due to COVID-19, reimbursed
- Assistance to individuals and families, housing food, utilities, funerals or emergency needs
  - “Such assistance should be structured in a manner to ensure as much as possible, within the realm of what is administratively feasible, that such assistance is necessary.”

## Treasury FAQ's Guidance (continued)

- Capital items necessary for temporary medical facilities and other measures to increase COVID19 treatment capacity or improve mitigation measures or respond to government public health emergency orders
- Costs for reopening facilities and mitigating COVID19 risks per CDC guidelines

## Treasury FAQ's Guidance (continued)

- Ineligible items
  - Cannot “double-dip” same costs from different federal resources
  - Costs reimbursed from insurance recoveries
  - Payroll or benefits expenses for employees not substantially dedicated to the COVID-19 response

## Financial Management in Crisis

- Tribes should define and include in their essential staff, their key financial, grants and procurement staff
- Due to the COVID-19 appropriations, someone to assist with tracking and applying for federal assistance
- Once federal awards made, review compliance requirements and identify compliance and Single Audit requirements
- See also our Handout – Tribal COVID-19 Federal Summary

## See Handouts

- COVID-3 CRF Treasury Guidance Use of Funds
- Treasury FAQs 5-4-20 and 4-22-20
- Tribal-Employment-and-Expenditure-Submission-Instructions
- REDW Tribal COVID-19 Federal Summary





# Coronavirus Response: Tax Considerations

**Mary Streit**

**Dorsey & Whitney LLP**

# Coronavirus Relief Fund: General Welfare Program Relief for Tribal Members

- **Identify needs within Tribal community**
- **Determine whether to alleviate any of those needs by providing assistance to Tribal members from CARES Act coronavirus relief funds**
- **Determine whether assistance should be provided at differing levels, depending on individual circumstances, or on an equal basis**
- **Adopt an appropriate resolution and program, ensuring that benefits will be nontaxable to Tribal members under the Tribal General Welfare Exclusion Act of 2014**

# Coronavirus Relief Fund: General Welfare Program Relief for Tribal Members

- **Key requirements of General Welfare Exclusion Act:**
  - the program is administered under specified guidelines
  - the program does not discriminate in favor of members of the governing body of the tribe, and
  - the benefits provided under such program—
    - are available to any tribal member who meets such guidelines,
    - are for the promotion of general welfare,
    - are not lavish or extravagant, and
    - are not compensation for services

# Coronavirus Relief Fund: General Welfare Program Relief for Tribal Members

- **Sample resolution language**

- WHEREAS, the Tribal Council has determined that significant hardships are being experienced by the Tribe and its members as a result of the COVID-19 pandemic, resulting from, among other things, [(1) the necessity for the Tribe to suspend certain tribal government operations, programs, services, and revenue-raising enterprises and to furlough employees who are members of the Tribe and members of their families, and (2) the necessity for other area employers to suspend operations and to furlough employees who are members of the Tribe and members of their families]; and
- WHEREAS, the Tribal Council believes it is imperative and will promote the general welfare of the Tribe and its members to distribute funds to or for the benefit of its members on an emergency basis during the COVID-19 pandemic to assist adult tribal members in making necessary payments for [food, housing, utilities, and other living expenses]; and

# Coronavirus Relief Fund: General Welfare Program Relief for Tribal Members

- **Sample resolution language (cont'd)**
  - WHEREAS, the Community has received funds through the CARES Act Coronavirus Relief Fund and determines that it is necessary and appropriate to allocate a portion of those funds for this emergency distribution [or distributions]; and
  - WHEREAS, the Tribal Council has determined to provide the emergency distribution [or distributions] to or for the benefit of tribal members on a nontaxable basis in accordance with the requirements of the federal Tribal General Welfare Exclusion Act of 2014, thereby preserving the availability of tribal funds for use in addressing the many anticipated and unanticipated needs of the Tribe and its members during the COVID-19 pandemic; and

# Coronavirus Relief Fund: General Welfare Program Relief for Tribal Members

- **Sample resolution language (cont'd)**
  - WHEREAS, [identify the amount of funds to be distributed or otherwise made available, and identify the basis upon which the amount of funds to be distributed is determined to be appropriate to address the needs identified above].
  - NOW THEREFORE BE IT RESOLVED, [adopt program set forth in an attached document and/or lay out the program terms in the resolution language]

# Payroll Tax Relief: FFCRA Credits

- **For sick leave and family leave wages required to be paid under FFCRA on and after April 1, 2020, refundable employment tax credits equal to entire amount of such wages**
- **Credits apply against 6.2% Social Security tax portion of employer's share of FICA tax**
- **If credit exceeds tax liability, excess is refundable**
- **In other words, the federal government reimburses employers for 100% of the sick leave and family leave wages required to be paid under FFCRA**

# Payroll Tax Relief: CARES Act Employee Retention Credits

- **Refundable employment tax credits of up to \$5,000 per employee equal to 50% of the following wages paid (“Qualified Retention Wages”):**
  - ***If employer has more than 100 full-time employees, available for wages (including certain health plan expenses) paid to employees who were not able to provide services due to the COVID-19 emergency as a result of government closure or partial closure orders or as a result of a decline in any quarter in 2020 in employer’s gross receipts of more than 50% compared to same quarter in 2019***
  - **If employer has 100 or fewer full-time employees, also available for wages (including certain health plan expenses) paid to *any* employees in in these circumstances, even if they are able to work**
  - **Aggregation rules apply to related parties to determine total number of employees**



# Payroll Tax Relief: CARES Act Employee Retention Credits (cont'd)

- **Certain exceptions apply, including that employers who receive a small business interruption loan under the Paycheck Protection Program not eligible**
- **For Indian tribes and tribal entities, IRS's current position is that credits are available only if tribe or tribal entity operates a "trade or business," apparently distinguishing governmental activities**
  - **IRS has stated that "additional information will be forthcoming regarding the determination of qualified wages for, and application of the aggregation rules to, these employers."**
  - **All of the IRS FAQs on employee retention credits can be found here: <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>**

# Payroll Tax Relief: CARES Act Employee Retention Credits (cont'd)

- Like the FFCRA credits, credits apply against 6.2% Social Security tax portion of employer's share of FICA tax and are refundable
- Credit applies to Qualified Retention Wages paid from March 13 to December 31, 2020

# Payroll Tax Relief: Tax Credit Procedures

- Credits to be claimed starting with second quarter Form 941
- No failure to deposit penalties imposed for amounts of employment taxes not deposited in anticipation of the FFCRA and CARES Act credits, as follows:
  - To the extent amounts not deposited are less than or equal to the amount of refundable tax credits to which employer is entitled as of the time of the deposit, *and*
  - Employer did not seek payment of an advance credit by filing Form 7200
- If these conditions are satisfied, employer can withhold the amount of the anticipated credits from deposits of *any* employment taxes and *any* FICA and federal income tax withholdings from employees
- Form 7200 provides an alternative mechanism for claiming advance credits

# Payroll Tax Relief: Deferral of Deposits and Payments of Employer Portion of Social Security Taxes

- **Substantially delays required dates for deposit of the employer portion of Social Security taxes, imposed at 6.2% of employee wages up to \$137,700 per employee**
  - **Applies to taxes due from March 27, 2020 through the end of the year**
  - **50% of such taxes must be deposited by December 31, 2021**
  - **The remaining 50% of such taxes must be deposited by December 31, 2022**
  - **Employers who receive loan forgiveness with respect to a Paycheck Protection Program loan are not eligible for this deferral**